



Neutral Citation Number: [2016] EWCA Civ 91

Case No: C1/2015/0459

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
THE RIGHT HONOURABLE LORD JUSTICE FULFORD & THE HONOURABLE
MRS JUSTICE LANG
[2015] EWHC 35 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE KITCHIN
and
THE RIGHT HONOURABLE LADY JUSTICE MACUR DBE

Between:

THE QUEEN (ON THE APPLICATION OF RIGHTS OF **Appellant**
WOMEN)

- and -

THE LORD CHANCELLOR AND SECRETARY OF **Respondent**
STATE FOR JUSTICE

Ms Nathalie Lieven QC and Ms Zoe Leventhal (instructed by **The Public Law Project**) for
the **Appellant**

Mr Neil Sheldon & Mr Alasdair Henderson (instructed by **Government Legal Department**)
for the **Respondent**

Hearing dates: 28th January 2015

Approved Judgment

Lord Justice Longmore:

Introduction

1. Legal aid is one of the hallmarks of a civilised society. Domestic violence is a blot on any civilised society but is regrettably prevalent. It is therefore no surprise that in an age of austerity, when significant reductions in the availability of legal aid are being made by Parliament, legal aid is preserved for victims of domestic violence who seek protective court orders or who are parties to family law proceedings against the perpetrator of the violence. The main reason for that preservation, apart from natural sympathy with the victims of domestic violence, is that they will be intimidated and disadvantaged in legal proceedings, if they are forced to represent themselves against and perhaps be cross-examined by the perpetrator of the violence.
2. In the wake of the accession on the part of the United Kingdom to the Convention on the Elimination of All Forms of Discrimination Against Women, the Government has adopted a cross-governmental definition of domestic violence as:-

“any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.”

This is the definition now contained in paragraph 12(9) of Part I of Schedule 1 of the Civil Legal Aid (Procedure) Regulations 2012 (“the 2012 Regulations”) as amended by article 4(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order SI 2013/748.

3. It is these Regulations which are at the heart of this appeal from the Divisional Court’s refusal of the claimant’s application to quash regulation 33 on the grounds that the Lord Chancellor has exceeded the powers conferred on him to make relevant regulations by section 12 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”).
4. Regulation 33 of the 2012 Regulations specifies the types of supporting evidence of domestic violence which must be provided in support of an application for legal aid under paragraph 12. The issue in this claim is whether procedural regulations have been unlawfully used to introduce more restrictive criteria for eligibility than those found in LASPO 2012, or whether they frustrate the statutory purpose, by prescribing the acceptable types of supporting evidence too rigidly and narrowly, thus excluding many women who ought to be eligible for legal aid under the terms of LASPO 2012. The argument has focused principally on the requirement that the supporting evidence must be less than 24 months old.
5. The claimant (“Rights of Women”) is a registered charity which gives free legal advice on family law (among other areas). It also campaigns and provides education and training on women's rights, with a particular specialism in gender-based violence. It has been fully engaged in the recent changes to civil legal aid.
6. Permission was granted by Burnett J. on a renewed application, after refusal by Cranston J. on the papers. Initially the claim also included grounds alleging breaches

of the Human Rights Act 1998. However, permission was refused for those grounds by Burnett J.

The Statutory Scheme

7. I gratefully adopt the summary given by Lang J in the Divisional Court.
8. Civil legal aid is now governed by Part 1 of LASPO 2012, which came into force on 1st April 2013. Civil legal aid covers the provision of advice and assistance as well as representation. LASPO 2012 specifies the categories of case for which legal aid is available. Thus it reverses the position under the Access to Justice Act 1999, and its predecessors, which provided for civil legal aid to be available in relation to any matter not expressly excluded.
9. Section 1 of Part 1 of LASPO 2012 provides that the Lord Chancellor “must secure that legal aid is made available in accordance with this Part”. “Legal aid” means, so far as material to this case:-
 - “(a) civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid),
...”
10. Section 9 provides as follows:-
 - “(1) Civil legal services are to be available to an individual under this Part if –
 - (a) they are civil legal services described in Part 1 of Schedule 1, and
 - (b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).”
11. The civil legal services which are described in Part 1 of Schedule 1 include services which are provided to actual or potential victims of domestic violence.
12. Paragraph 11, entitled “Family homes and domestic violence”, makes provision for civil legal services in relation to home rights, occupation orders, non-molestation orders, and injunctions following assault, battery or false imprisonment arising out of a family relationship.
13. Paragraph 12, entitled “Victims of domestic violence and family matters”, makes provision for:-
 - “(1) Civil legal services provided to an adult (“A”) in relation to a matter arising out of a family relationship between A and another individual (“B”) where –
 - (a) there has been, or is a risk of, domestic violence between A and B, and

(b) A was, or is at risk of being, the victim of that domestic violence.”

14. Paragraph 12(7) provides that there is a “family relationship” between two people if they are associated with each other. This has the same meaning as under section 62 of the Family Law Act 1996 which includes spouses, civil partners, cohabitants, relatives, and those in the same household, subject to exceptions.
15. Paragraph 12(8)(a) defines a “matter arising out of a family relationship” as including “matters arising under a family enactment”. A “family enactment” is one of a list of statutory provisions set out under paragraph 12(9)(a)-(o). In summary, they include:-
 - i) Advice and representation in relation to divorce and financial relief and enforcement;
 - ii) Advice and representation on applications for transfers of tenancies;
 - iii) Disputes over children, including child arrangement orders (formerly contact and residence), prohibited steps orders to protect children against abduction or harmful contact with a parent, child maintenance and financial orders.
16. Paragraph 13, entitled “Protection of children and family matters”, makes provision for civil legal services for an adult in proceedings relating to a child who is at risk of abuse. “Abuse” is defined as “physical or mental abuse including sexual abuse and abuse in the form of violence, neglect, maltreatment and exploitation”.
17. Section 10 concerns the funding of “exceptional cases” which do not come within the scope of Section 9. Since domestic violence cases come within paragraph 9, there is little scope for “exceptional” domestic violence cases to be considered pursuant to this section.
18. Section 11, entitled “Qualifying for civil legal aid”, provides that the Director must determine whether an individual qualifies for civil legal services in respect of financial resources and overall merits.
19. Financial eligibility for legal aid is governed by section 21 and the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.
20. By subsection 11(2), the Lord Chancellor, in setting merits criteria, must consider the circumstances in which it is appropriate to make civil legal services available under Part 1, and consider the extent to which the criteria ought to reflect the factors in subsection (3).
21. The factors set out in subsection (3) are:-
 - “(a) the likely cost of providing the services and the benefit which may be obtained by the services being provided,
 - (b) the availability of resources to provide the services,

(c) the appropriateness of applying those resources to provide the services, having regard to present and likely future demands for the provision of civil legal services under this Part,

(d) the importance for the individual of the matters in relation to which the services would be provided,

(e) the nature and seriousness of the act, omission, circumstances or other matter in relation to which the services are sought,

(f) the availability to the individual of services provided other than under this Part and the likelihood of the individual being able to make use of such services,

(g) if the services are sought by the individual in relation to a dispute, the individual's prospects of success in the dispute,

(h) the conduct of the individual in connection with services made available under this Part or an application for such services,

(i) the conduct of the individual in connection with any legal proceedings or other proceedings for resolving disputes about legal rights or duties, and

(j) the public interest.”

22. Subsection 11(5) provides:-

“The criteria must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.”

23. The merits criteria are set out in the Civil Legal Aid (Merits Criteria) Regulations 2013.

24. Section 12 is the enabling power under which the 2012 Regulations were made. It provides:-

“12. Determinations

...

(2) Regulations may make provision about the making and withdrawal of determinations under section 9 and 10.

(3) Regulations under subsection (2) may, in particular, include

—

(a) provision about the form and content of determinations and applications for determinations,

(b) provision permitting or requiring applications and determinations to be made and withdrawn in writing, by telephone or by other prescribed means,

(c) provision setting time limits for applications and determinations,

(d) provision for a determination to be disregarded for the purposes of this Part if made in response to an application that is made otherwise than in accordance with the regulations,

(e) provision about conditions which must be satisfied by an applicant before a determination is made,

(f) provision about the circumstances in which a determination may or must be withdrawn,

(g) provision requiring information and documents to be provided,

(h) provision requiring individuals who are the subject of a determination to be informed of the reasons for making or withdrawing the determination, and

(i) provision for giving information to individuals who do not qualify for civil legal services under this Part about alternative ways of obtaining or funding legal services.

(4) ...

(5) ...

(6) ...”

25. Section 41 makes general provision in respect of the power to make orders, regulations and directions under LASPO 2012. Regulations are subject to either negative or affirmative resolution procedure, depending on the section under which they are made. Regulations made under section 12 are subject to negative resolution procedure.

The 2012 Regulations

26. The 2012 Regulations were made by the Lord Chancellor on 12th December 2012 and came into force on 1st April 2013. Following a review, in which the Claimant (among others) made representations, the 2012 Regulations were amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2014. This occurred in parallel with the pre-action correspondence to this claim and so the matters raised therein were considered, so the Defendant says, as part of the review. The 2014 Regulations were laid before Parliament on 27th March 2014 and came into force on 22nd April 2014.

27. Regulation 33, as amended at the time of the hearing before the Divisional Court, provides as follows (the 2014 amendments are set out in underlined text and the deleted text is struck through):-

“33. Supporting documents: domestic violence

(1) An application for civil legal services described in paragraph 12 of Part 1 of Schedule 1 to the Act must include evidence of the domestic violence or the risk of domestic violence.

(2) For the purpose of para (1), the evidence of domestic violence or risk of domestic violence must be provided in one or more of the following forms—

(a) a relevant unspent conviction for a domestic violence offence;

(b) a relevant police caution for a domestic violence offence given within the twenty four month period immediately preceding the date of the application for civil legal services;

(c) evidence of relevant criminal proceedings for a domestic violence offence which have not concluded;

(d) a relevant protective injunction which is in force or which was granted within the twenty four month period immediately preceding the date of the application for civil legal services;

(e) an undertaking given in England and Wales under section 46 or 63E of the Family Law Act 1996 (or given in Scotland or Northern Ireland in place of a protective injunction) —

(i) by the individual ("B") with whom the applicant for civil legal services ("A") was in a family relationship giving rise to the need for the civil legal services which are the subject of the application; and

(ii) within the twenty four month period immediately preceding the date of the application for civil legal services,

provided that a cross-undertaking was not given by A;

(ea) evidence that B is on relevant police bail for a domestic violence offence

(f) a letter from ~~the person appointed to chair~~ any person who is a member of a multi-agency risk assessment conference [MARAC] confirming that—

(i) A was referred to the conference as a ~~high-risk~~ victim of domestic violence; and

(ii) the conference has, within the twenty four month period immediately preceding the date of the application for civil legal services, put in place a plan to protect A from a risk of harm by B;

(g) a copy of a finding of fact, made in proceedings in the United Kingdom within the twenty four month period immediately preceding the date of the application for civil legal services, that there has been domestic violence by B giving rise to a risk of harm to A;

(h) a letter or report from a health professional who has access to the medical records of A confirming that ~~the~~ that professional or another health professional—

(i) has examined A in person within the twenty four month period immediately preceding the date of the application for civil legal services; and

(ii) was satisfied following that examination that A had injuries or a condition consistent with those of a victim of domestic violence; ~~and~~

~~(iii) has no reason to believe that A's injuries or condition were not caused by domestic violence;~~

(i) a letter from a social services department in England or Wales (or its equivalent in Scotland or Northern Ireland) confirming that, within the twenty four month period immediately preceding the date of the application, A was assessed as being, or at risk of being, a victim of domestic violence by B (or a copy of that assessment);

(j) a letter or report from a domestic violence support organisation in the United Kingdom confirming—

~~(i) that A was, within the twenty four month period immediately preceding the date of the application for civil legal services, admitted for a period of twenty four hours or more to a refuge established for the purpose of providing accommodation for victims of, or those at risk of, domestic violence;~~

(i) that A was, within the twenty four month period immediately preceding the date of the application for civil legal services (and, where relevant, that period commences with the date on which A left the refuge), admitted to a refuge established for the purpose of

providing accommodation for victims of, or those at risk of, domestic violence;

(ii) the dates on which A was admitted to and, where relevant, left the refuge; and

(iii) that A was admitted to the refuge because of allegations by A of domestic violence.

(k) a letter or report from a domestic violence support organisation in the United Kingdom confirming—

(i) that A was, within the twenty four month period immediately preceding the date of the application for civil legal services, refused admission to a refuge established for the purpose of providing accommodation for victims of, or those at risk of, domestic violence, on account of there being insufficient accommodation available in the refuge; and

(ii) the date on which A was refused admission to the refuge;

(l) a letter or report from—

(i) the person to whom the referral described below was made;

(ii) the health professional who made the referral described below; or

(iii) a health professional who has access to the medical records of A,

confirming that there was, within the twenty four month period immediately preceding the date of the application for civil legal services, a referral by a health professional of A to a person who provides specialist support or assistance for victims of, or those at risk of, domestic violence;

(m) a relevant domestic violence protection notice issued under section 24 of the Crime and Security Act 2010, or a relevant domestic violence protection order made under section 28 of that Act, against B within the twenty four month period immediately preceding the date of the application for civil legal services;

(n) evidence of a relevant court order binding over B in connection with a domestic violence offence, which is in force or which was granted within the twenty four month

period immediately preceding the date of application for civil legal services.”

28. The only other specific evidential requirements imposed by the 2012 Regulations are:-
- i) Applications in damages claims. Regulation 32 requires that the application must include an estimate of likely damages, for which requirements are set out; and
 - ii) Applications for the protection of children under paragraph 13 of Schedule 1. Regulation 34, entitled “Supporting documents: protection of children” requires evidence of the risk of abuse must be provided in one or more of the prescribed forms, which are similar to those in regulation 33.
29. Thus, by way of very broad summary, regulation 33 provides that legal aid will not be available unless documentary verification of domestic violence is provided within the 24 month period before the application for legal aid is made save for instances of an unspent conviction, un-concluded criminal proceedings and existing police bail for a domestic violence criminal offence.
30. Rights of Women claims that regulation 33 goes beyond the regulation making power contained in section 12 of the LASPO and is thus ultra vires the statute. Alternatively they claim that the regulation, in breach of the principles to be found in Padfield v Minister of Agriculture [1968] A.C. 997, frustrates the purpose of the Act which is that women suffering from domestic violence as defined in paragraph 12(9) of Part I of Schedule 1 of LASPO should be eligible for legal aid provided that they qualify under section 11 in respect of their financial resources and the overall merits of their cases. In this connection they point out that none of the requirements of regulation 33 is geared to that part of the definition of domestic violence which refers to financial abuse.

The judgment of the Divisional Court

31. The Divisional Court in a judgment delivered by Lang J (with whom Fulford LJ agreed) did not deal with this last point but in relation to the claim generally it held that regulation 33 was within the regulation making power conferred by section 12 of LASPO and did not frustrate the purpose of the Act. Lang J said (para 54) that the primary purpose of LASPO was to make substantial reductions in civil legal aid expenditure principally by removing certain types of legal proceedings from the scope of legal aid altogether while its secondary purpose (para 56) was to encourage the use of alternative means of dispute resolution without resort to legal proceedings. It could not be said that those purpose were frustrated by the requirements of regulation 33.
32. Both this court and the court below were presented with a considerable body of evidence tending to show that potential applicants for legal aid had been (or were likely to be) refused legal aid in circumstances in which, it was submitted, Parliament had intended legal aid to be available. This evidence was partly specific, partly anecdotal and partly statistical. Such evidence cannot be relevant (and is therefore not strictly admissible) on the ultra vires argument which is a pure question of law. It

does, however, appear to be relevant (and admissible) on what I will call the Padfield argument, see R (Ben Hoare Bell Solicitors) v Lord Chancellor [2015] 1 WLR 4175.

33. The statistical evidence has to be treated with caution since the conclusions on which Rights of Women chiefly relies were based on a relatively small number of correspondents, but it is convenient to give an outline of the cases referred to us M and N:-

M.

M was a victim of serious physical, sexual and psychological abuse (rape, strangulation, beating, other sexual assault, controlling/coercive behaviour) from her husband and father of two of her children. She had a variety of objective forms of evidence within regulation 33 but all outside 24 month time limit by a few months. Exceptional funding under section 10 was requested and refused. M suffered a relapse of her psychological condition by reason of attending proceedings unrepresented against her ex-husband who sought contact with children more than 2 years later. Only then was she able to obtain a medical report and, as a result of that report, obtain legal aid. The objective evidence M had at the time of her legal aid application, none of which entitled her to legal aid under regulation 33 was as follows:-

- a) a caution for a domestic violence offence – but this was more than 24 months old;
- b) the allegation of rape in September 2010 which was reported to the police, but in respect of which no charges were brought – police reports/call-outs do not fall within regulation 33;
- c) the police had referred her to a MARAC who had assessed her as high risk; the report from November 2010 was more than 24 months old;
- d) social services Child in Need reports regarding the children dating from June 2011, the latest of which was 25 months old;
- e) counselling at a Rape Crisis centre which ended in June 2011 and was more than 24 months earlier;
- f) findings of fact made in the divorce proceedings in 2010 more than 24 months before the application was made;
- g) evidence from her former outreach worker from the local children's centre – there is no provision for this in regulation 33; and

h) a CAFCASS report dated 2nd July 2013 prepared in the Claimant's ongoing proceedings for child contact. This detailed the history of domestic violence and assessed the risks to the children: its conclusion was that it would not be in the children's best interests to progress contact. There is no provision for CAFCASS reports in regulation 33.

N.

N was a victim of serious physical assault and psychological abuse by her husband. The objective forms of evidence were (a) a conviction for assault in 2006 (spent), injunctions, findings of fact in divorce and previous contact proceedings, two psychologist's reports from previous proceedings detailing psychological impact on her of abuse – PTSD. All the evidence was outside the 24 months period. Exceptional funding was refused. She began proceedings without legal aid but they induced flash-backs to previous assaults. Only then could she obtain a GP report and obtain legal aid.

Ultra Vires?

34. Ms Lieven submitted that, on the true construction of section 1 of LASPO (“the Lord Chancellor must secure that legal aid is made available ...”) and section 9 (“Civil legal services are to be available to an individual ... if they are civil legal services described in Part I of Schedule 1”), any individual suffering from domestic violence (as defined in paragraph 12(9) of Part I of Schedule 1) who qualified under section 11 by meeting the requirements of lack of financial resources and overall merits, was entitled to legal aid as of right. This entitlement could not then be taken away by a regulation made under section 12. Section 12 on its true construction did not empower the Lord Chancellor to impose any bar to the obtaining of legal aid which was not contemplated by Section 11. That was because section 12 related only to the process by which a determination was to be made (or withdrawn) and only empowered matters of procedure to be laid down by regulation not matters of substance. A provision for the evidence of domestic abuse to be dated within the 24 months prior to the applications for legal aid operated as a substantive bar to the application and was accordingly beyond the power conferred by Section 12.
35. I cannot accept this argument. In the first place there is no warrant for saying that Section 11 is the only section pursuant to which regulations barring applications for legal aid can be made. Sections 11 and 12 have to be read together and with the other statutory provisions including Sections 1 and 9. Secondly I can see no warrant for construing Section 12 as relating to procedural matters only (whatever that may precisely mean). Ms Lieven categorised time bars as substantive but there is much learning in the general common law of limitation as to the circumstances in which a time bar is procedural because it bars the remedy or substantive because it bars, or takes away, the right. It cannot possibly be right to import that learning into questions of statutory construction and ultra vires.

36. One must just construe Section 12 according to its terms. It empowers the Lord Chancellor to make (inter alia) “(e) provision about conditions which must be satisfied by an applicant before a determination is made”. A condition that a GP (or other) report be provided must be within that power as well as within provision (g). A condition that such report must be dated within the previous 24 months seems to me likewise to come within the statutory wording.

Padfield and purpose?

37. This is more problematic. The first question is to ascertain the relevant statutory purpose. Some assistance in this regard may be obtained from the judgments in Public Law Project v Lord Chancellor [2015] 1 WLR 251; [2015] EWCA Civ 1193 which related to a proposed exclusion from Part I of Schedule 1 of LASPO of persons who had not been lawfully resident in the United Kingdom for a 12 month period as well as on the date when the application for legal aid was made. The Divisional Court held that this provision was ultra vires the rule-making power contained in section 9 of LASPO; this court in a judgment of Laws LJ (with whom Kitchin and Christopher Clarke LJ agreed) reversed that decision but, in so doing, in paragraph 11 cited without disapproval paragraph 37 of Moses LJ in the Divisional Court:-

“Analysis of Part 1 of Schedule 1 shows that the statute seeks to confine civil legal services which the Lord Chancellor must secure to cases which are judged to be of the greatest need. Those cases are identified by reference not only to the circumstances which an individual might face but also by reference to personal characteristics or attributes, for example, children or those suffering from mental ill health. But whether defined by reference to their status or by reference to their circumstances, Part 1 of Schedule 1 seeks to identify those individuals and their circumstances having the greatest need for civil legal services. Leaving aside questions of financial resources and merits, no example can be found within the primary legislation of a distinction drawn between those entitled to civil legal services and those who are not on grounds other than assessment of need. The purpose lying behind the identification of services in Part 1 of Schedule 1 is to identify need. Thus, Parliament has chosen to exercise a judgment according to the criteria of need and not on any other basis.”

38. Laws LJ added in paragraph 20 that the central importance attached to need was amply demonstrated by the Department’s own published documents, a proposition from which I did not understand Mr Neil Sheldon, who appeared on this appeal for the Lord Chancellor, to dissent. He did, however, emphasise, as Mr James Eadie QC had for the Lord Chancellor in the PLP case, the numerous references in the Departmental material to the saving of expenses and the more efficient disposition of legal aid services. As to that Laws LJ said:-

“The reality is that need and cost are not strange bedfellows. It must be obvious that in circumstances of financial stringency choices as to the disposition of public funds in a particular area will focus on need for the service in question. Thus it is not

merely unsurprising that Part 1 of Schedule 1 lists categories where the need for civil legal aid is pressing; it is, in effect, inevitable.”

39. Although the ascertainment of the purpose of the legislation is for the court, not for the Minister, this court’s approach in PLP is effectively confirmed by the witness statement of the Head of Family and Immigration Legal Aid Policy at the Ministry of Justice, Mr Joe Parsons, who said:-

“3. From the outset the legislative and policy intent was to ensure that those victims of domestic violence who genuinely required assistance in court proceedings were able to obtain legal aid. This is evident from the consultation paper and the Government’s response to it. The MOJ also made this clear in subsequent actions, including departmental impact assessments and when conducting further reviews. These informed the secondary legislation governing the forms of acceptable evidence of domestic violence for the purpose of determining eligibility for legal aid.

4. On 10th November we published a consultation paper entitled “Proposals for the Reform of Legal Aid in England and Wales. In relation to civil legal aid, the paper explained:

“4.2.1. The scheme in this current form is no longer sustainable financially if the Government is to meet its commitment to reduce the public financial deficit. We have therefore had to make tough decisions about where best to target resources.”

5. The paper proposed to specify in legislation the areas where legal aid would continue to be available to litigants. It set out the areas of civil and family law proposed for retention in the legal aid scheme and the areas proposed for exclusion from the legal aid scheme.

6. The paper proposed to retain legal aid for domestic violence and forced marriage cases, such as those involving non-molestation orders and occupation orders. However “given the need to direct resources at the issues of highest importance in a fair and balanced way”, it was considered that legal aid would not be routinely justified for ancillary relief and private law family and children proceedings (4.67). This was subject to an exception, in recognition of the fact that “where there is an ongoing risk of physical harm from domestic violence, different considerations apply”. In relation to such cases, the Ministry of Justice consider that “the provision of legal aid is justified where the client may be unable to assert their rights and may face intimidation because of risk of harm” (4.67).”

40. Since I have thought it appropriate to quote from Mr Parsons' statement it is only fair to add that he says in paragraph 33:-

“[t]he policy intention is to provide legal aid where an individual will be materially disadvantaged by facing their abuser in court, not simply to provide open-ended access to legal aid for domestic violence. The time limit provides a test of the on-going relevance of the abuse.”

As to this passage, it is necessary to remark first that civil legal services are not confined to services for proceedings in court in which the victim of domestic violence has to face her (or his) abuser but must extend to relevant pre-court assistance. Secondly the reference to the time limit, if read on its own, risks pre-empting what the court has to decide; it is for the court to ascertain the purpose of the statute from its wording not for the minister or his officials, see Padfield itself at page 1030 and R v Secretary of State, ex parte Spath Holmes Limited [2001] 2 A.C. 349, 382.

41. Drawing the threads together it seems to me that the purpose of the statute (or, more crucially, the relevant parts of the statute) read as a whole is partly to withdraw civil legal services from certain categories of case in order to save money but also to make such services available perhaps not to the entire membership of most deserving categories of case (such as victims of domestic violence) but at any rate to the great majority of persons in the most deserving categories. That will be catered for partly by the requirements of financial need and merit as set out in section 11 but can also be catered for by requirements which the Lord Chancellor is entitled to impose under the section 12 regulation-making power. The question will then be whether any such additional requirements (such as the 24 month time limit) are rationally connected with that purpose, see Ben Hoare Bell para 40 per Beatson LJ and Ouseley J.
42. Mr Sheldon protests that this shows that the challenge being made to regulation 33 is in truth a rationality challenge, a challenge which the Rights of Women have always disavowed. But that is to confuse the Wednesbury jurisdiction with the Padfield jurisdiction of the court, when they are separate concepts. Any discretion conferred on a Minister “should be used to promote the policy and objects of the statute”, R (Electoral Commission) v Westminster Magistrates' Court [2011] 1 A.C. 496 para 15 per Lord Phillips of Worth Matravers PSC. As Lord Kerr of Tonughmore JSC said (at para 83) of R (GC) v Commissioner of Police of the Metropolis [2011] 1 WLR 1230:-

“... a discretion conferred with the intention it should be used to promote the policy and objects of the Act can only be validly exercised in a manner that will advance that policy and those objects. More pertinently, the discretion may not be exercised in a way that would frustrate the legislation's objectives.”

Any inquiry as to frustration of purpose must consider whether there is a rational connection between the challenge requirement and the legislation's purpose.

43. Ms Lieven submitted that the evidence shows (as practitioners in the Family Division know from their own experience) that there are many situations in which victims of domestic violence find themselves at the receiving end of legal proceedings not

merely more than 24 months after incidents of domestic violence have occurred but more than 24 months after it is practical to obtain the kind of verification required by regulation 33. Examples of such cases are:-

- i) the perpetrator may have been in prison; once he (it is almost always he) is released, he may initiate proceedings for child contact or divorce and financial settlement; regulation 33(2)(a) can only be relied on if the conviction preceding the prison sentence is a relevant conviction for a domestic violence offence and if it is unspent; if the sentence is a fine or a community order, the conviction will be spent after only 12 months from the date of conviction or from the last day the order is to have effect;
- ii) there may have been a non-molestation order (or other form of injunction) which has kept the parties apart for 2 years but has expired before legal proceedings are begun;
- iii) a similar period of separation may have occurred for other reasons such as the receipt of a police caution or other police involvement; criminal proceedings may have been instituted which do not result in a conviction; such non-convictions occur for many reasons other than that the alleged perpetrator is innocent;
- iv) there is no time limit for the initiation of proceedings for child contact; a refusal of child contact does not prevent a re-initiation of proceedings which can therefore be served again on the victim of domestic abuse after the expiry of the two year period. Additionally, the court can direct, pursuant to section 91(14) of the Children Act 1989, that no such proceedings shall be begun without permission of the court for a period until the expiry of the two year period in which domestic abuse could be verified in accordance with the Regulations; if the Court also directs that any application for permission is not to be served on the respondent, a victim of domestic abuse may receive no notice of prospective proceedings within the relevant period in which she may otherwise take steps to obtain verification;
- v) The main priority of any victim of domestic violence will be to make immediate arrangements for her personal safety and that of her children; this may take a considerable time particularly if the abuse was prolonged or the marriage was originally a forced one; any proceedings sought to be brought by the victim for divorce or financial relief may well be more than 24 months after any practical ability to obtain verification has passed;
- vi) although the definition of domestic violence extends beyond physical abuse to psychological or emotional abuse, the verifications required by regulation 33 are much more easily satisfied where there has been physical abuse than where there has been psychological or emotional abuse. This means that even though signs of psychological or emotional abuse may persist longer than sign of physical abuse, there is considerable difficulty for the victim in obtaining the necessary verification after any lapse of time; and
- vii) victims of financial abuse will not be able to obtain any of the verifications required by regulation 33 at all. (The only answer Mr Sheldon could give to

this last point was the inadequate one that victims of financial abuse could always be expected to show evidence of psychological abuse).

44. This is a formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases. But does it go so far as to show that the 24 month requirement has no rational connection with the statutory purpose?
45. In my judgment it does. There is, as Ms Lieven submits, no obvious correlation between the passage of such a comparatively short period of time as 24 months and the harm to the victim of domestic violence disappearing or even significantly diminishing. No doubt the 24 month requirement serves the purposes of the statute as the Divisional Court considered them to be but as I have said those purposes are not the only purposes of the statute. Once it is accepted that part of the statutory purpose is to ensure that legal aid is available to (at any rate the great majority of) sufferers from domestic violence, one has to ask why it is that so many of them are excluded by virtue of the 24 month rule. Mr Parsons' assertion that "the time limit provides a test of the on-going relevance of the abuse" does not justify the many excluded instances or the lack of any opportunity for victims of domestic violence to explain why it would be unjust to apply the time limit to their particular case. It operates in a completely arbitrary manner
46. It might be different if there was some safety valve which enabled the victims of domestic violence to explain why it was that they were unable to obtain verification of that violence less than 24 months before proceedings begin. But there is no such safety valve. Mr Sheldon pointed to section 10 of LASPO which deals with exceptional circumstances. Section 10 deals with cases which do not come within section 9 and Part 1 of Schedule 1, which could include those that fail to comply with the requirements of regulation 33. However, the instances set out in para 43 above are hardly exceptional at all and neither M nor N qualified.
47. So for the above reasons I would conclude that, subject to one point, regulation 33 does frustrate the purposes of LASPO in so far as it imposes a requirement that the verification of the domestic violence has to be dated within a period of 24 months before the application for legal aid and, indeed, insofar as it makes no provision for victims of financial abuse.

Legislative history

48. Mr Sheldon, however, strongly relied as did the Divisional Court on the legislative history of LASPO with regard to victims of domestic abuse. The position is set out in detail in the judgment of the Divisional Court (paras 74-80) and can be summarised by saying that during debate in the House of Lords an amendment was passed to insert a provision to the effect that no time limit would apply to the forms of evidence that would be accepted in relation to domestic violence; that was rejected by the House of Commons. When the bill returned to the House of Lords, a motion was passed to introduce a provision that no evidence was to be inadmissible on the ground of time where the general limitation in civil law had not elapsed. This amendment was again defeated in the House of Commons and not insisted upon when the House of Lords considered the matter for the third time. The Divisional Court considered that the challenge by Rights of Women in the present case was an attempt "to achieve through the courts that which they could not achieve in Parliament" in the words of

Lord Bingham in R (Countryside Alliance) v Attorney General [2008] 1 A.C. 719 at [45].

49. In one sense that is, of course, true. But the case in which that observation was made, like others that have followed it such as the spare room subsidy case in the Court of Appeal, R (MA) v Secretary of State for Health and Pensions [2014] PTSR 584, were cases founded on assertions of breach of the European Convention of Human Rights where the question was whether potential breaches in statutes or regulations could be justified as proportionate responses in areas with respect to which the European Court of Human Rights has always accorded respect to local legislatures.
50. The doctrines of ultra vires and frustration of the purposes of the statute in its Padfield form are not susceptible to a similar blanket respect for the legislature. I have already said that for the purposes of the Padfield doctrine it is for the court to ascertain the parliamentary purpose from the words of the statute. The fact that the House of Commons has rejected proposed amendments to the statute which would have better promoted the statutory purpose cannot absolve the court from considering whether regulations, in their final form, when laid before the House and approved by way of negative resolution, do in fact frustrate or thwart that purpose.

Conclusion

51. I would therefore allow this appeal and, subject to any further argument about the detail of the form of order, in principle declare that regulation 33 is invalid insofar as it
- a) requires verifications of domestic violence to be given within a 24 month period before any application for legal aid; and
 - b) does not cater for victims of domestic violence who have suffered from financial abuse.

Lord Justice Kitchin:

52. I agree.

Lady Justice Macur:

53. I also agree.